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No. 95-157

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT ROBERT ROZELLE

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QUESTIONS PRESENTED

1. What is the legal standard that must be met in order for a defendant in a criminal prosecution to be entitled to discovery on a selective prosecution claim.

2. Whether a defendant in making a discovery motion on a selective prosecution claim must in every case present evidence that the government has failed to prosecute others who are similarly situated, or is it sufficient if the defendant's discovery motion raises only a reasonable inference that the government has failed to prosecute others who are similarly situated.

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JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE FACTS

In April of 1992, respondents Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Police Department and agents from the Bureau of Alcohol, Tobacco, and Firearms. (Pet. App. 4a)

All five respondents were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the respondents were also charged with selling cocaine base

under 21 U.S.C. § 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the respondents with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine base. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health & Safety Code § 11351.5. All five respondents are Black. (Pet. App. 4a)

Respondents filed a motion for discovery on a claim of selective prosecution, arguing that the decision to prosecute on federal charges rather than state charges was based on race. To support the motion for discovery, the respondents offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been Black. (J.A. 68-70)

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court. (Pet. App. 4a-5a)

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violation of 21 U.S.C. §§ 841 and 846 over a three year period without any racial breakdown and declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations asserted that socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history. (J.A. 71-83)

In opposition to the motion for reconsideration, the respondents submitted additional declarations of their counsel. First, one of the respondents' counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addicts, Whites and Blacks dealt and used the drug in equal numbers. Second, another attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-Blacks were prosecuted for cocaine base offenses in state court. Finally, the respondents submitted an article from the *Los Angeles Times* which reported that 92.6% of all drug offenders sentenced to federal prison for cocaine

base offenses from April 1, 1992 to July 31, 1992 were Black. (J.A. 138-142; 209-210)

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena." (J.A. 217)

The government again chose not to comply with the discovery order. (J.A. 223-224) The respondents moved to dismiss the indictment as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. (J.A. 226; 231) The government timely appealed.

The original three judge panel reversed, finding that the respondents' study did not establish a colorable basis for ordering discovery because it did not show that others similarly situated were not prosecuted. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994). A rehearing was granted and an en banc court affirmed the discovery order and dismissal, finding that the respondents' study did establish a colorable basis for believing that similarly situated members of other races were not prosecuted and that there was no abuse of discretion. *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995).

SUMMARY OF THE ARGUMENT

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The legal test for obtaining discovery on a selective prosecution claim is the "colorable basis" test. A defendant must show a colorable basis for his selective prosecution claim before he can obtain such discovery. The term "colorable basis" has been defined as "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States, supra* at 624. (Marshall, J., dissenting)

The government's argument that the legal test for discovery requires a "substantial threshold showing" is based upon dicta in a case where the defendant made no showing of unconstitutional discrimination. Defense counsel in that case unnecessarily conceded that the standard for discovery was a substantial threshold showing. *Wade v. United States*, 504 U.S. 181, 186 (1992).

The government's argument that the showing to obtain discovery must include some evidence that similarly situated persons have not been prosecuted, is based primarily upon language in a case which decided the merits of a selective prosecution claim. *Ah Sin v. Wittman*, 198 U.S. 500, 507 (1905). Indeed, the government has conceded that the "showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution." (Gov't. Brief p. 25)

Respondent would urge the Court to rule that a defendant has established a colorable basis when the defendant's showing on a discovery motion raises a "reasonable inference" that he may be a victim of selective prosecution. The reasonable inference approach is similar to the approach taken in cases where a defendant claims that a prosecutor's repeated use of peremptory challenges to exclude Blacks from a jury was unconstitutionally motivated by race. *Batson v. Kentucky*, 476 U.S. 79, 93-97 (1986). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). See also, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

In respondents' case, the showing made for discovery was a statistical study prepared by the Federal Public Defender's office. The study showed that in the 24 cases involving cocaine base charges closed by that office in 1991, all of the defendants were Black. The respondents also presented declarations from their defense counsel stating that there are cocaine base offenders who are White, who have been prosecuted in state court. The essence of the selective prosecution claim in this case was that Black cocaine base offenders were being unconstitutionally selected for prosecution in federal court where the penalties are higher, rather than in state court where the penalties are lower. The district court made a factual finding that the discovery motion had established a colorable basis and granted the motion.

Since district courts have wide discretion in ruling on discovery matters, the standard of review on appeal is the abuse of discretion standard. *United States v. Nixon*, 418 U.S. 683, 702 (1974). Under the clearly erroneous standard of review, a reviewing court may not reverse a factual finding of the district court simply because it is convinced that it would have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The finding by the district court in this case that respondents' discovery motion established a colorable basis for a selective prosecution claim, is a factual finding that is entitled to deferential review. Under the facts of this case, the district court did not abuse its discretion.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION.

The decisions of both the district court and the en banc court of appeals in this case should be affirmed. The district court granted the respondents' motion for discovery on a selective prosecution claim. When the government, standing on principle, refused to comply with the discovery order, the district court dismissed the indictment. The court of appeals held that the district court had

the discretion to order discovery on a selective prosecution claim on the record in this case. It affirmed the order and the dismissal of the indictment. The court of appeals ruled that a discovery motion on a selective prosecution claim may be ordered if a defendant presents evidence establishing a "colorable basis" that he is a victim of selective prosecution.

Both the court of appeals and the district court were aware of the elements of the law of selective prosecution. The government on this appeal contends that the lower courts did not know when it was appropriate to order discovery on a claim of selective prosecution. Thus, the issue in this case does not concern the elements of selective prosecution. The issue is what is the legal standard to be met for a defendant in a criminal case to be entitled to discovery on a selective prosecution claim. Is that legal standard the "colorable basis" test? If so, what is the correct legal definition of the term "colorable basis?" Finally, did the district court abuse its discretion in ordering discovery in this case?

A. The Colorable Basis Test Provides The Appropriate Balance Between The Right Of The Government To Vigorously Enforce The Criminal Laws And The Right Of The Accused To Be Free Of Unconstitutional Selective Prosecution.

The government first argues that a prosecutor has broad discretion to enforce the criminal laws and that a defendant seeking discovery on a claim of selective prosecution must make a substantial threshold showing on

each element of the claim. (Gov't. Brief p. 20) The government relies upon several policy considerations in support of their argument: the decision to prosecute is ill-suited to judicial review; judicial supervision entails systemic costs, such as delays in the proceedings; judicial supervision chills law enforcement efforts and undermines prosecutorial effectiveness. *Wayte v. United States*, 470 U.S. 598, 607 (1985). Although all of these policy considerations are valid, it does not follow that they require a substantial threshold showing before discovery may be granted.

The legal issues concerning discovery related to a selective prosecution claim have never been directly before this Court before. The issue concerning the required showing needed to obtain such discovery is an issue of first impression. Indeed, it has been over ten years since the Court had before it a case involving a selective prosecution claim. In that case, *Wayte v. United States*, 470 U.S. 598 (1985), the Court was faced with a district court order dismissing an indictment on the grounds that the defendant had established a prima facie case of selective prosecution in a criminal prosecution for failure to register for the draft. The defendant argued that he had been singled out for prosecution because he was an outspoken opponent of the draft and that his prosecution was undertaken on the impermissible ground of punishing him for exercising his First Amendment right of free speech. Ultimately, this Court reversed the dismissal order, finding that even if the record established that the government's action had a discriminatory effect, the record did not show that the government intended

this effect or had prosecuted the defendant because of his protests. *Wayte v. United States, supra* at 608-610.

In a footnote, the Court in *Wayte* expressly stated that it was not deciding "whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution" because he had not raised the issue in his petition for certiorari, his brief on the merits, or at oral argument. *Wayte v. United States, supra* at 605 n.5. Furthermore, this Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), relied upon by the government for its "substantial threshold showing" language, did not resolve the controversy raised in this case.

In *Wade v. United States, supra*, this Court held that a district court may subject the government's refusal to file a substantial-assistance motion to review for constitutional violations, if for example, the prosecutor refused to file such a motion because of the defendant's race or religion. On the issue of discovery, the defendant in *Wade* conceded that to obtain discovery he had to make a substantial threshold showing. *Ibid* at 186. Furthermore, the record showed that the defendant had no evidence at all upon which to make any showing. Thus, the language in *Wade* is dicta and the Court should not premise important legal decisions on a concession of a party to a case.[1]

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[1] Indeed, in *Batson v. Kentucky*, 476 U.S. 79, 112-115 (1986) the Court ignored a concession made by petitioner's counsel that he was not making an equal protection argument and that he was not asking for the Court to overrule *Swain v. Alabama*, 380 U.S. 202 (1965). The Court's ultimate decision in *Batson* overruled *Swain* and held that petitioner's right to equal protection had been violated. *Batson v. Kentucky, supra* at 97, 100.

At the time of this Court's *Wayte* decision, the general consensus in the court of appeals was that the legal test for obtaining discovery on a selective prosecution claim was the "colorable basis" test. *Wayte v. United States*, 470 U.S. 598, 623-24 (1985) (Marshall, J., dissenting). As Justice Marshall noted in his dissenting opinion "[A] defendant establishes his right to discovery if he can show a 'colorable basis' for a selective prosecution claim." *Wayte v. United States, supra* at 623, citing *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States v. Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976); *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974); *United States v. Berrigan*, 482 F.2d 171, 181 (3rd Cir. 1973). The term "colorable basis" was defined as "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States, supra* at 624, citing *United States v. Berrios, supra* at 1211.

The court of appeals in respondents' case stated that "Discovery may be ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." *United States v. Armstrong*, 48 F.3d 1501, 1512 (9th Cir. 1995). "The colorable basis standard is met by 'some evidence tending to show the essential elements of the claim.' *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990)." *United States v. Armstrong, supra* at 1512. In further defining the term "some evidence" the court of appeals stated that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors." *United*

States v. Armstrong, supra at pp. 1512-1513, citing *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992). The majority of the Circuits are in accord with this view.[2]

In the leading case of *United States v. Berrios*, 510 F.2d 1207 (2d Cir. 1974), a defendant charged with holding a union office within five years after conviction for a felony made a selective prosecution claim. The defendant claimed that he was chosen for prosecution because he was a Teamster official who was an outspoken supporter of Senator McGovern for President opposing President Nixon, and because he had spearheaded an effort to unionize a restaurant chain that enjoyed close ties with President Nixon and his family. The defendant's attorney filed an affidavit alleging his belief that there were hundreds of unions with officers who have prison records. On this showing, the district court ordered discovery of

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[2] The majority of the Circuits, the Third, Sixth, Seventh, Ninth, Tenth and District of Columbia have adopted the "colorable basis" test. *In re Grand Jury*, 619 F.2d 1022, 1030 (3d Cir. 1980); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989); *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990); *United States v. Armstrong*, 48 F.3d 1508, 1512 (9th Cir. 1995); *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992); *Attorney General of United States v. Irish People, Inc.*, 684 F.2d 928, 948 (D.C. Cir. 1982). Four Circuits, the First, Second, Fifth, and Eighth, apply a stricter "prima facie" showing test. *United States v. Penagarican-Soler*, 911 F.2d 833, 838 (1st Cir. 1990); *St. Germain of Alaska Easter Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir. 1988); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir. (1994). Two Circuits, the Fourth and Eleventh, have adopted the "non-frivolous" standard. *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986); *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1988).

the letter from the prosecutor to his superiors which originally sought authorization for the prosecution of Berrios. When the government refused to comply with the order, the indictment was dismissed.

On appeal, the Second Circuit held that discovery on a selective prosecution claim may be ordered if the defendant can establish a "colorable basis" for his claim. A colorable basis was defined as "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *United States v. Berrios, supra* at 1211-1212. The court of appeals noted that Berrios had not presented any evidence of other persons similarly situated who have not been prosecuted. *Ibid.* at 1212. The court also noted that the appellate judges doubted whether they would have ordered discovery on Berrios's meager showing. *Ibid.* at 1211. Nevertheless, the court of appeals found no abuse of discretion in the district court's order for the government to turn over to the court the memorandum recommending prosecution. *Ibid.* at 1212, citing *United States v. Nixon*, 418 U.S. 683 (1974).[3]

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[3] Similar results were reached in two other court of appeals cases. In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the defendant was charged with tax fraud and perjury based on testimony she had given in an earlier sex discrimination suit against the Equal Employment Opportunity Commission. She made a discovery motion on the issue of selective prosecution. She presented evidence that there had never been perjury indictments in the past in the District arising out of testimony in a civil case and that in the preceding five years in the District there had been no indictments for tax evasion where the taxes were not still due at the time of indictment. Finally, she presented an affidavit from a former director of the E.E.O.C. stating

The government argues that the showing to obtain discovery must include some evidence that similarly situated persons have not been prosecuted. (Gov't. Brief pp. 21-27) According to the government, selective prosecution requires a showing that there has been a selection. "Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances. Where defendant cannot show anyone in a similar situation who has not been prosecuted, . . . he has not 'met even the threshold of the *Yick Wo* doctrine – official discrimination . . . between persons in similar circumstances, material to their rights.' " *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982).

In *Ah Sin v. Wittman*, 198 U.S. 500 (1905), the defendants were convicted of violating an ordinance forbidding presence in a locked room containing exposed gambling tables. Ah Sin sought a writ of habeas corpus on the grounds that the ordinance was enforced solely against Chinese. This Court, however, affirmed the denial

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that in his opinion the criminal action was brought against the defendant in retaliation for her earlier sex discrimination suit. The court of appeal held that the colorable basis test had been met and that the district court erred in denying the discovery motion. The court stated: " 'Some evidence' of vindictive prosecution has been presented here. It is hard to see, indeed, how the defendants could have gone much farther than they did without the benefit of discovery on the process through which this prosecution was initiated." *Id.* at 1146. In *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), the defendant presented evidence that the government was targeting Black political leaders for voter fraud. The court ordered discovery, finding that the defendant met the colorable basis test. *Id.* at 1540.

of the writ finding that petitioner's allegation was insufficient for failure to allege and prove "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese" and that there were non-Chinese offenders against whom the ordinance was not enforced. *Ibid.* at 507.

Applying these cases, the government argues that before a discovery motion for selective prosecution may be granted, the moving party must present specific instances or cases where other persons similarly situated have not been prosecuted. The government argues that the respondents' study by the Federal Public Defender's office in Los Angeles, that showed that each defendant in the 24 cocaine base cases closed by that office in 1991 had been Black, was an insufficient showing. In essence the government is arguing that in order to obtain discovery on a selective prosecution claim, respondents were required to show at least one case where a White defendant committed a cocaine base criminal offense and was not prosecuted for that offense in federal court, where the penalties for those offenses are higher than in state court.

However, if the respondents had evidence of such a case, there would be no need to bring a discovery motion. Respondents could simply proceed to the second step and file a motion to dismiss the indictment for selective prosecution. The government's argument fails to recognize the fundamental difference between a discovery motion on a selective prosecution claim and a motion to dismiss the indictment for selective prosecution. As the court of appeals in this case correctly points out: "The standard for a discovery showing is lower than that for a prima facie case." *United States v. Armstrong*, 48 F.3d 1508, 1513

(9th Cir. 1995). The government concedes in its brief that the "showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution." (Gov't. Brief p. 25)

Justice Reinhardt also noted in his dissenting opinion in the original panel decision: "If they could make such a showing without any discovery, there would be no need for discovery in the first place." *United States v. Armstrong*, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J. dissenting). While proof of a particular case of one White defendant who commits a cocaine base offense and is not prosecuted in federal court may arguably be necessary for a motion to dismiss the indictment for selective prosecution, it is not an essential requirement for the granting of a discovery motion on selective prosecution.[4] As Justice Marshall noted in the *Wayte* decision, "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *Wayte v. United States*, 470 U.S. 598, 624 (1985).

On a discovery motion, all that is required is that the defendant present some evidence of a colorable basis for believing that discriminatory prosecutorial selections have occurred. A colorable basis is some evidence tending to show the essential elements of a selective prosecution claim. Establishing a colorable basis for believing

[4] Since this case only involves a discovery motion, it is unnecessary to decide in this case what proof must be presented in order to prove the merits of a selective prosecution claim. The government did not petition the Court on that issue and it is not now before the Court for decision.

that other persons similarly situated have not been prosecuted does not mean that a defendant must offer into evidence specific facts and evidence establishing who these other persons are. All that is required at the discovery phase in order to meet the colorable basis test is some evidence which raises a reasonable inference that discriminatory prosecutorial selections have been made.

B. The Colorable Basis Test Is Met When A Defendant Has Presented Evidence Which Raises A Reasonable Inference That The Charges In His Case Are A Result Of Unconstitutional Selective Prosecution.

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." This admonition is applicable to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Wayte v. United States*, 470 U.S. 598, 608 (1985).

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court applied the principles of equal protection of the law to the discriminatory enforcement of a San Francisco ordinance which prohibited a person from maintaining a laundry in a building not made of brick or stone without first obtaining a permit from the board of supervisors. Permits were only granted to non-Chinese applicants and Yick Wo, an unsuccessful applicant, was thereafter convicted and imprisoned for maintaining a laundry without a permit. Finding that the board had impermissibly discriminated against Chinese applicants, the Court declared

that Yick Wo's conviction and imprisonment violated the Equal Protection Clause. The Court stated that "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373-374.

A central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Accord, *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Discrimination on the basis of race is especially pernicious in the administration of justice because it "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-556 (1974). See generally, *Developments – Race and the Criminal Process*, 101 Harv. L. Rev. 1520 (1988).

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Rather, a claim of selective prosecution must be

based upon a claim that the selection "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

To obtain discovery on a selective prosecution claim, a party need only show a "colorable basis" for the claim, which requires "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States*, 470 U.S. 598, 624 (1985) (Marshall, J. dissenting); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). In order for a discovery motion to be granted, it does not require proof of the elements of a selective prosecution claim to the same extent as would be needed on a motion to dismiss the indictment. Rather, a colorable basis can exist if a defendant's showing on a discovery motion raises a reasonable inference that he may be the victim of selective prosecution. For example, in one case a court stated that a discovery motion on a selective prosecution claim may be granted where the defendant presents "enough evidence to demonstrate a reasonable inference of invidious discrimination." *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir. 1992).[5]

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[5] In *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992) the court of appeal reviewed a district court's finding that the United States attorney was committing equal protection violations by treating male drug couriers more harshly in plea bargaining than similarly situated females. The court noted that a district judge who perceives a pattern of invidious enforcement has ample authority under the court's supervisory powers to raise the matter sua sponte. The court also held that if invidious discrimination is proven, one remedy could be a reduction of a defendant's sentence. However, on the record presented, the court found no evidence of intentional discrimination and reversed and remanded for further proceedings. The

The "reasonable inference" concept arises directly from this Court's reasoning in *Batson v. Kentucky*, 476, U.S. 79, 93-97 (1986). In *Batson*, this Court held that it is a violation of equal protection for a prosecutor in a criminal case to use his peremptory challenges to remove trial jurors on the basis of their race. Recognizing that an equal protection violation would require purposeful discrimination, the Court stated that a pattern of strikes against Black jurors may give rise to an "inference of purposeful discrimination." *Ibid.* at p. 96. The burden then shifts to the prosecution to come forward with a neutral explanation for challenging Black jurors. *Ibid.* at p. 97. The same logical approach exists in respondents' case, where the showing on the discovery motion raised a reasonable inference that prosecutors were selecting only Black defendants for prosecution in federal court for cocaine base offenses where the penalties were higher than in state court. The trial court, finding a colorable basis of selective prosecution, granted the discovery motion and ordered the government to respond with an

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court stated that a district judge's own observations of disparate impact establishes a prima facie case of selective prosecution, but without more, is an insufficient basis for finding that the prosecutor was motivated by a discriminatory purpose. Upon remand, the district court conducted an evidentiary hearing concerning the U.S. Attorney's office policy concerning plea bargaining and its relationship to gender. The district court again found gender discrimination and reduced the sentences. On the government's appeal the Ninth Circuit again reversed the district court, ruling that the evidence did not support the district court's finding of gender-based selective prosecution. *United States v. Redondo-Lemos*, 27 F.3d 439 (9th Cir. 1994).

explanation which would either prove or disprove the claim of purposeful discrimination.

The lesser showing required for discovery as compared to a claim on the merits is the reason that this Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) is distinguishable. In *McCleskey*, this court held that statistics establishing a higher percentage of Black defendants receiving the death penalty in the state of Georgia did not alone prove that the decisionmakers in those cases acted with a discriminatory purpose in violation of the Equal Protection Clause. However, the *McCleskey* case was not a case involving the issue of discovery. It was a ruling on the merits of an argument made to vacate a death sentence in a murder case. The respondents in this case have not yet made a motion to dismiss the indictment for selective prosecution. They have only made a motion for discovery. Even if the statistical evidence is found to be insufficient to prove the merits of a selective prosecution claim, it does not follow that statistical evidence is valueless. If the statistical evidence raises a reasonable inference of selective prosecution, then it should be sufficient to warrant the granting of a discovery motion on a selective prosecution claim.

The use of the term "reasonable inference" in defining colorable basis is also consistent with the approach taken by this Court in cases involving claims of racial discrimination in the grand jury selection process. *Castaneda v. Partida*, 430 U.S. 482 (1976); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Whitus v. Georgia*, 385 U.S. 545 (1967). In cases involving claims of racial discrimination

in the selection of the grand jury, this Court has permitted the use of statistical evidence to establish an inference of purposeful discrimination. *Castaneda v. Partida, supra* at 492-498. See also, *Turner v. Fouche*, 396 U.S. 346, 360-361 (1970); *Bazemore v. Friday*, 478 U.S. 385, 397-404 (1986) (Error to exclude statistical evidence when offered to prove racial discrimination). In *Hernandez v. Texas*, 347 U.S. 475 (1954), where a defendant showed that fourteen percent of the population was Mexican-American, but no Mexican or Latin American name had ever appeared on either a grand or petit jury list in the past twenty-five years, this Court stated: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Id.* at 482. "Once a defendant has shown a substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Castaneda v. Partida, supra* at 495.

Although the burden of proving purposeful discrimination is on the defendant, *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), the defendant may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Sometimes a clear pattern, unexplainable on grounds other than race,

emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). See also, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[6] "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Castaneda v. Partida*, 430 U.S. 482, 494.

All of the equal protection cases cited above, which discuss the inference of purposeful racial discrimination from evidence of government action causing a discriminatory effect, have involved the merits of an equal protection claim. Since respondents' case involves the showing needed for obtaining discovery, it would seem logical to require a lesser showing of evidence of a disparity in order to infer purposeful racial discrimination. For that

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[6] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), are examples of cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city "from a square to an uncouth twenty-eight sided figure." 364 U.S. at 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the over 200 Chinese applicants were unsuccessful.

reason, it is appropriate to define the term colorable basis as evidence which raises a reasonable inference of selective prosecution, when choosing a legal standard for discovery.[7]

C. District Courts Are Vested With Wide Discretion In Ruling On Discovery Issues And There Was No Abuse Of Discretion By The Court's Order Granting The Discovery Motion In This Case.

The district courts have wide discretion in ruling on discovery matters. The standard of review on appeal from a discovery order is the abuse of discretion standard. *United States v. Nixon*, 418 U.S. 683, 702 (1974);

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[7] Concerning the general law of discovery in criminal cases, this Court has stated that there is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966). "[T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases." *Wardius v. Oregon*, 412 U.S. 470, 473 (1973) citing Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279.

In California state court criminal prosecutions a defendant may obtain discovery from the prosecutor by filing a motion for discovery describing the requested information with some degree of specificity and establishing "plausible justification." *Ballard v. Superior Court*, 64 Cal. 3d 159, 167, 49 Cal. Rptr. 302, 410 P. 2d 838 (1966). The California Supreme Court has applied the same standard of criminal discovery to discovery motions related to a claim of selective prosecution. *Murgia v. Municipal Court*, 15 Cal. 3d 286, 306, 124 Cal. Rptr. 204, 540 P. 2d 44 (1975); *Griffin v. Municipal Court*, 20 Cal. 3d 300, 306-307, 142 Cal Rptr. 286, 571 P.2d 997 (1977).

Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting). A discovery order may not be set aside on appeal for an abuse of discretion unless the district court acted arbitrarily or made factual findings that have no support in the record. *United States v. Nixon, supra* at 702.

The exercise of judicial discretion "implies conscientious judgment, not arbitrary action . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' " *Burns v. United States*, 287 U.S. 216, 222-223 (1932). A party appealing to the discretion of the court "is entitled to fair judgment, and is not to be made a victim of whim or caprice." *Ibid.* at 223.

When a district court makes a factual finding that a defendant has made a colorable showing of selective prosecution, it is similar to a factual finding of intentional discrimination. Compare, *Anderson v. Bessemer City*, 470 U.S. 564 (1985). In *Anderson* the Court held that a district court's finding of discriminatory intent in a civil rights action is a factual finding that may be overturned on appeal only if it is clearly erroneous. *Anderson v. Bessemer City, supra* at 566, citing *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City, supra* at 573. "Where there are two permissible views of the evidence,

the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City, supra* at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). See also *Amadeo v. Zant*, 486 U.S. 212, 226 (1988).

In the district court, the respondents in this case filed a motion for discovery on a selective prosecution claim setting forth a statistical study prepared by the Federal Public Defender's office in Los Angeles. The study showed that in the 24 cases involving cocaine base charges closed by that office in 1991, all of the defendants were Black. (J.A. 68-70) The essence of the claim was that Black cocaine base offenders were being unconstitutionally selected for prosecution in federal court where the penalties were higher, rather than being prosecuted in state court where the penalties were lower.[8]

In response to the motion, the government presented no evidence at all. It merely argued that the respondents' showing failed to establish a colorable basis. (J.A. 149-150) The court granted the motion stating that "what the Court wants to know is whether or not there is any

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[8] In federal court, the crime of possession with intent to distribute cocaine base, involving 50 grams, carries a penalty of a mandatory minimum of 10 years to life. With one prior felony drug offense, the sentence is a mandatory 20 years to life. With two prior felony drug offenses, the sentence is a mandatory life without parole. 21 U.S.C. § 841(b).

In California state court, the crime of possession for sale of cocaine base involving 50 grams, carries a penalty of imprisonment for either 3, 4 or 5 years. Cal. Health & Saf. Code § 11351.5. If the defendant has no prior convictions, he may be granted probation. Cal. Health & Saf. Code § 11370. The court may impose an additional 3 years consecutive sentence for each prior felony drug conviction. Cal. Health & Saf. Code § 11370.2.

criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is the criteria . . . and if its not based on race what is it based on?" (J.A. 162)

The government filed a motion for reconsideration of the discovery order. In that motion the government presented the affidavits of two Assistant United States Attorneys, a D.E.A. agent, an A.T.F. agent, and an Inglewood Police Officer, all stating that race was not the reason for the prosecution in this case.[9] (J.A. 71-81) The general criteria for prosecution was stated to be the amount of drugs (over 100 grams of cocaine base), multiple sales, a joint federal and state investigation, the use of firearms, the strength of the evidence, the existence of threats on arresting officers, and the existence of prior criminal records.[10] (J.A. 80-81) D.E.A. Public Information Officer

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[9] This Court has stated on several occasions that simple protestation from government officials that racial considerations played no part in the selection process is insufficient to dispel a prima facie case of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 498 n.19 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Hernandez v. Texas*, 347 U.S. 475, 481 (1954). In any event, it was for the district court to decide whether the protestations of racial neutrality had any weight in the final determination of whether respondents had shown a colorable basis of selective prosecution. In this case, the district court made an implied finding that they did not dispel the inference of discrimination raised by the respondents' motion.

[10] The record indicates that the district court did not believe that the United States Attorney had made full disclosure of the charging criteria because of their argument that full disclosure would create a danger in revealing law enforcement strategies. (J.A. 192-193) The court stated "They haven't done it yet." (J.A. 193) The court also stated that "the government

Ralph Lockridge stated in his declaration that it was the experience of D.E.A. agents that "narcotics offenders as a whole cover an entire spectrum of different races, sexes, and religions." However, "[w]ith respect to cocaine base (or "crack") virtually all major crack traffickers uncovered in the Los Angeles area have been Black." (J.A. 72-73)

The motion for reconsideration was opposed by respondents who filed declarations of their counsel. One counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, Whites and Blacks dealt and used the drug in equal numbers. Another defense attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-Blacks were prosecuted for cocaine base offenses in state court. Finally, the respondents submitted an article from the *Los Angeles Times* disclosing sentencing statistics establishing that 92.6% of all persons sentenced for federal cocaine base offenses are Black, as opposed to 4.6% who are White. (J.A. 138-142, 208-210)

At the hearing on the motion for reconsideration of the discovery order, the government provided a list of all 2,400 federal narcotics prosecutions during the relevant

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hasn't provided the information, who really does have the responsibility for making the decision" concerning which cocaine base cases would be prosecuted in federal court rather than state court. (J.A. 191) Ultimately, the district court made a factual finding that the government had not disclosed its true and complete criteria for determining which cases would be prosecuted in federal court. (J.A. 217)

three year period. It did not indicate which of the cases involved cocaine base and did not provide the race of the defendants. The government also provided the court with an informal survey of the United States Attorney's office and established that there had been seven other non-Black defendants prosecuted for cocaine base offenses in federal court. All of these defendants appeared from their names to be Hispanic. (J.A. 82-83) Conspicuously absent was any evidence that a White defendant had ever been prosecuted in federal court for a cocaine base offense.[11]

The hearing on the motion for reconsideration, rather than indicating an abuse of discretion, was a model of a court carefully considering all aspects of the case and intelligently exercising its discretion. The district court was guided by a recent Ninth Circuit decision, *United States v. Bourgeois*, 964 F. 2d 935, 938 (9th Cir. 1992) which held that "To succeed on a selective prosecution claim,

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[11] In a subsequent case involving a discovery motion on a selective prosecution claim in Los Angeles, the government responded with more statistical evidence showing that as of 1992, the date of the Armstrong discovery motion, the United States Attorney's office in Los Angeles had never prosecuted a White person in federal court for a cocaine base offense. *United States v. Turner*, 901 F. Supp. 1491, 1496 (C.D. Cal. 1995).

"Similar discriminatory patterns exist outside of Los Angeles. A 1992 Commission survey shows that only minorities were prosecuted for crack offenses in more than half the federal court districts handling crack cases. No Whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one White was convicted in California, two in Texas, three in New York and two in Pennsylvania." H.R. No. 104-272 reported in *U.S. Code Congressional & Administrative News*, 104th Congress, 1st Sess. pp. 335, 353 (Dec. 1995).

the defendant bears the burden of showing both 'that others similarly situated have not been prosecuted and [also] that the prosecution is based on an impermissible motive.' " The *Bourgeois* case had attempted to apply this Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985) to the issue of discovery.

At the conclusion of the second full hearing on the discovery order, the district court was left with essentially two available conclusions. The first was the government's argument that the high number of Black defendants being prosecuted in federal court for cocaine base offenses was explained because only Blacks were selling crack cocaine. The second was the respondents' argument that the high number of Black defendants being prosecuted in federal court (where the penalties were higher) as opposed to state court (where the penalties were lower) was because Black defendants were being selectively prosecuted on the basis of race. Compare, *Anderson v. Bessemer City*, *supra* at 573-574 (District Court has discretion to make either finding); *United States v. Marshall*, 56 F. 2d 1210 (9th Cir. 1995) (No abuse of discretion in denying a discovery motion based upon the same FPD statistics).

The district court ultimately held that the discovery order would stand and denied the motion for reconsideration. On the narrow issue of whether the respondents' motion for discovery had established a colorable basis for selective prosecution, the district court decided that it did. The court stated:

> The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the Government disclosing criteria, if there is any criteria, for bringing this case and others like it in Federal court.
>
> Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race. (J.A. 217)

In finding a colorable basis for the claim of selective prosecution, the district court was saying that the statistical showing of the 24 cases handled by the Federal Public Defender and the other evidence presented in the declarations of defense counsel, had raised a reasonable inference that the respondents were being prosecuted in federal court as opposed to state court because of their race. Indeed, it is important to recognize that an intentional racially motivated selective prosecution practice would also produce the same results, namely, all of the prosecutions for cocaine base in federal court would be against Black defendants. Compare, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Intentional discrimination resulted in no Blacks serving on grand juries for 12 years); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Intentional discrimination resulted in no Hispanics serving on grand juries for 25 years); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Intentional racial discrimination resulted in no Blacks attending segregated public schools).

The government argues that the court of appeals' decision in this case improperly relied upon a presumption that people of all races commit all types of crimes and that in cases involving racial discrimination it is unnecessary to present evidence that similarly situated persons were not prosecuted. Neither statement in the

court of appeals' decision should be viewed as creating new law. Rather the statements are recognition that each case must be decided on its own facts. Certainly statistics showing that 100% of those sentenced for antitrust violations were White, would not be significant enough to establish a colorable basis of selection prosecution.

On the other hand, respondents' case is significantly different because of two important factors. The first factor is that the claim of racial discrimination involves discrimination against a racial minority. Black Americans are a racial minority in the United States that historically have been subjected to racial discrimination. The history of this discrimination and its origins are fully detailed in Justice Marshall's dissenting opinion in *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 387-401 (1978). See also, *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) overruled in *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994). In *Strauder v. West Virginia*, 100 U.S. 303 (1880) this Court held unconstitutional a state statute making Blacks ineligible to serve on juries. In reversing Strauder's murder conviction, the Court established that the Constitution protects racial minorities in the criminal justice system of a society in which "[d]iscriminations against them had been habitual." *Ibid.* at 306. See also, *Vasquez v. Hillery*, 474 U.S. 254 (1986). As recently as 1967, this Court was called upon to strike down racially discriminatory statutes affecting Black Americans. *Loving v. Virginia*, 388 U.S. 1 (1967).

The second important factor is that the claim of racial discrimination is made in a case involving cocaine base or "crack." Since its enactment, the harsh penalties in the Anti-Drug Abuse Act of 1986 for cocaine base offenses

have fallen almost exclusively upon Black Americans. Despite the fact that Black Americans comprise only 12% of the population, 92.6% of those sentenced to federal prison are Black, as opposed to 4.6% who are White. With respect to powder cocaine, the percentages are largely reversed.[12] (J.A. 209-210) In a Sentencing Commission report to Congress on this problem it states:

> "In the course of our study, we were faced with clear evidence that crack cocaine penalties are imposed largely on African-Americans. Almost 90 percent of federal crack offenders are Black. This disproportionate impact creates a perception of unfairness and raises allegations of racial bias. Everyone concerned with the legitimacy of the criminal justice system – and with the willingness of all citizens to accept its judgment as fair and final – must be troubled by allegations of unfairness, particularly racial discrimination." *U.S. Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine*

[12] In the Eastern District of Missouri between 1988 and 1992, 98.2% of those convicted of federal crack cocaine charges were Black. *United States v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994). In the Eastern District of Washington, 91% of all federal crack cocaine prosecutions were brought against Black Americans, while less than 1% of the population is Black. *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995). In the Central District of California, out of the 149 defendants who were charged with federal crack cocaine offenses from 1992 to 1995, 74.7% were Black, 19.2% were Hispanic and 5.5% were Asian. *United States v. Turner*, 901 F. Supp. 1491, 1496 (C.D. Cal 1995). The court in *Turner* found that only one, out of 149 persons prosecuted, was White, and the evidence raised an irresistible inference that he was deliberately targeted so that a White person could be included in subsequent prosecution statistics. (*Ibid.*)

Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995).

Most of the cases involving cocaine base offenses involve relatively small quantities of the drug. However, small quantities of cocaine base will bring lengthy sentences, when compared to the sentences imposed for powder cocaine.[13] The actual sentencing ratio is 100 to 1 between the sentences for crack cocaine and powder cocaine.[14] "Under the 100 to 1 quantity ratio, an offender must distribute 100 times as much powder cocaine as a similar crack offender to receive the same base sentence. Thus, all crack offenders, whether violent or non-violent, receive the especially severe sentences." *United States Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine Offenses*, 57 Crim. L. Rptr. 2127, 2129 (May 31, 1995).

Recognizing the disparate treatment between crack and powder cocaine offenders and recognizing the

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[13] For example, a drug trafficker with 70 grams of crack has a mandatory minimum sentence of 10 years and a Guideline sentence range of 121 to 155 months. A drug trafficker with 70 grams of powder cocaine has no mandatory minimum and has a Guideline range of 21 to 27 months. (J.A. 209-210) See, United States Sentencing Guidelines § 2D1.1 and 21 U.S.C. §§ 841(b) and 960(b).

[14] Title 21 U.S.C. Sections 841(b) and 960(b) establish the 100 to 1 quantity ratio between powder and crack cocaine. They mandate a minimum sentence of at least five years for first offenders whose offense involves 5 grams of crack or 500 grams of powder, and a ten-year sentence for offenses involving 50 grams of crack or 5 kilograms of powder. Repeat offenders receive lengthier sentences.

unusually large numbers of Blacks incarcerated for federal crack offenses, the United States Sentencing Commission recommended that the Sentencing Guidelines be changed to equalize penalties for similar quantities of crack and powder cocaine by eliminating the 100 to 1 drug quantity ratio. See, Amendment 5, in U.S. Sentencing Commission, *"Amendments to the Sentencing Guidelines"* (May 1, 1995). However, Congress passed legislation blocking the changes in the Guidelines and the President signed into law a bill which retains the 100 to 1 ratio. P.L. 104-38; 109 Stat. 334. Nevertheless, a dissenting view of ten members of the House of Representatives Judiciary Committee was published in the House Report, stating that treating crack cocaine different from powder cocaine "makes the current federal sentencing scheme discriminatory on its face." H.R. No. 104-272 reported in *U.S. Code Congressional & Administrative News*, 104th Congress, 1st Sess., pp. 335, 352 (Dec. 1995).[15]

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[15] The dissenting view in the House Report also states:

> "No analysis of the racially discriminatory impact of the current federal sentencing scheme is complete without discussion of the laws' targeted enforcement by federal law enforcement. According to a recent Los Angeles Times article, the U.S. Attorney's office in Los Angeles openly admits to targeting its resources towards minority communities. In an interview, Los Angeles U.S. Attorney Nora Manella acknowledged that federal agents have focused their resources in minority communities, where the crack trade is believed to be the most prevalent and violent. As a result of this acknowledged targeting of minority communities in the Los Angeles area, not a single white has been convicted of a crack cocaine offense in

The controversy over the disparate sentences between crack and powder cocaine and the fact that federal prisons are being filled with large numbers of Black defendants, sentenced to long prison terms for cocaine base offenses, are an important background to the discovery motion in this case. As the Los Angeles Times noted "No drug is more closely associated with race than crack cocaine." "Harsher Crack Sentences Criticized as Racial Inequality," *Los Angeles Times* (Nov. 23, 1992) (J.A. 208-209) Given this background, the claim of selective prosecution was appropriately raised in this case.

Admittedly, the district court in respondents' case did not resolve the difficult question of the merits of the selective prosecution claim raised in this case. The district court only ruled that discovery was properly ordered and that respondents' statistical evidence and declarations established a colorable basis for their claim of selective prosecution. Under the facts of this case, the district court did not abuse its discretion.

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federal courts serving Los Angeles and its six surrounding counties since Congress enacted its mandatory sentences for crack dealers in 1986. Instead, virtually all white offenders are prosecuted in state court, where sentences are far less, with differences of up to eight years for the same offense." H.R. No. 104-272.

CONCLUSION

The judgment of the court of appeals should be affirmed.[16]

Respectfully submitted,

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[16] Dismissal of the indictment was the correct sanction for the government's refusal to obey the district court's lawful discovery order. See *Alderman v. United States*, 394 U.S. 165, 210 (1969); *Jencks v. United States*, 353 U.S. 657, 672 (1957). The government has not argued otherwise in its brief.